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21 April 1989  
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MEMORANDUM FOR: Chief, Administrative Law Division  
Office of General Counsel

FROM:

Legislation Division  
Office of Congressional Affairs

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SUBJECT: Department of Justice Letter on Drug Testing  
Bill, H.R. 763

1. Attached for your review and comment is a copy of the  
aforementioned letter, as well as the bill it addresses. The  
letter criticizes the bill in several respects, noting that it  
would have adverse effects on the national security.

2. The Office of Management and Budget has asked for our  
comments on this letter. I ask that you refer them to me no  
later than 2 May 1989. You may telephone me on [redacted]  
with your response.

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Attachments

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## Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable William D. Ford  
Chairman, Committee On Post  
Office and Civil Service  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your request, dated February 22, 1989, for this Department's position on H.R. 763, "Restrictions Relating to Drug Testing by Federal Agencies." We appreciate the opportunity to review this bill and comment on its possible impact particularly concerning litigation against the United States.

A number of aspects of this bill are very troubling. First, the bill would prohibit almost all forms of drug testing of both civilian and military personnel. As you know, the Supreme Court very recently addressed the issue of federal government drug testing and upheld as constitutional a Federal Railway Act regulation authorizing mandatory drug testing without suspicion of drug use for certain railway employees following major train accidents as well as a U.S. Customs Service policy of testing applicants for certain sensitive positions. Skinner v. Railway Labor Executives' Ass'n, No. 87-1555 (U.S. March 21, 1989); National Treasury Employees Union v. Von Raab, No. 86-1879 (U.S. March 21, 1989). We believe H.R. 763 should be carefully re-examined in light of these decisions since under the bill, federal agencies would be forbidden to test employees involved in on-the-job accidents. Additionally, under the bill, agencies would be prohibited from testing applicants for any kind of position within the government regardless of the crucial nature of the duties involved. Agencies would also be prohibited from testing employees in sensitive public safety, law enforcement or national security positions on a random basis to assure that they are drug-free. Agencies could not test employees as a follow-up to counselling for drug abuse and addiction thereby impeding the success of programs designed to rehabilitate employees with drug problems.

As you know, on September 15, 1986, President Reagan issued Executive Order 12564, entitled "Drug-Free Federal Workplace," 51 Fed. Reg. 32,889 (1986), which established a uniform policy that all federal employees are required to refrain from the use of

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illegal drugs and which directed each agency to develop a drug-free workplace plan which would include random testing for sensitive positions, reasonable suspicion, post-accident, follow-up, and applicant testing. H.R. 763 would not only serve to nullify the drug testing plans issued or scheduled to be issued pursuant to this Executive Order but would also eliminate a number of testing programs throughout the government, some of which have been ongoing for several years, including the programs upheld by the recent Supreme Court decisions. For example, H.R. 763 would eliminate the Defense Department program which has conducted over 40,000 tests in the past five years. The bill would not only eliminate this ongoing testing of military personnel but also ongoing testing programs for such employees as Secret Service personnel who protect the President, air traffic controllers, and civilian guards at military weapons installations. In sum, the federal government would be deprived of an effective tool for maintaining drug-free workplaces which has been upheld by the Supreme Court and which is used extensively by private employers.

Second, the bill prohibits all drug testing of both civilian and military personnel, except when supervisors determine that an employee's performance is impaired and when "there is reason to believe that the impairment is due, in whole or in part, to the employee's then being under the influence of a controlled substance." § 7352(b)(2)(A)(ii). Although this type of testing, often called "reasonable suspicion" testing, is useful in detecting and deterring drug use in some circumstances, reasonable suspicion testing alone often is not effective in detecting and deterring drug use among employees. For example, some types of federal employees frequently or even regularly perform their duties away from supervisory observation. Furthermore, reasonable suspicion testing alone simply would be ineffective because the impairment caused by illegal drug use often cannot be observed, even by the highly trained, and, thus, would go undetected.

Additionally, the very restrictive form of reasonable suspicion testing permitted by the bill would prove even more ineffective for detecting and deterring drug use. Under H.R. 763, supervisors would have to wait to conduct a reasonable suspicion drug test until the employee's performance on the job is impaired. Thus, under the language of this bill, even if a supervisor saw an employee taking illegal drugs on the job or had good reason to believe that the employee was under the influence of drugs, reasonable suspicion testing would be prohibited until the employee's job performance was impaired. For many federal employees in highly sensitive and responsible positions, such a delay in testing could significantly jeopardize public safety, the safety of other employees, national security or other vital duties. Furthermore, the bill's emphasis on on-the-job impairment ignores legitimate interests of the federal government

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in assuring that its employees do not use illegal drugs on or off the job. For example, federal drug law enforcement efforts could be seriously compromised by law enforcement personnel who use illegal drugs either on or off the job.

Third, the bill would authorize the Office of Personnel Management to establish technical guidelines for the acquisition, handling, and analysis of drug test samples. As you know, specific technical provisions for many of the current federal urinalysis testing programs have been set out in the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 Fed. Reg. 11,970 (April 11, 1988), issued by the Department of Health and Human Services ("HHS") pursuant to Executive Order 12564. These guidelines are the result of several years of very careful and thorough consideration by an agency that clearly has the necessary medical and technical expertise. The guidelines serve to safeguard individual privacy, protect against accidental or intentional contamination of the urine sample, establish a careful chain of custody procedure to avoid sample mix-ups, and set rigid laboratory standards and quality control to assure the accuracy of test results. Moreover, the Supreme Court in its recent decisions in Skinner and Von Raab expressly considered and upheld the HHS Guidelines as significantly minimizing drug testing programs' intrusion on privacy interests. To vest responsibility in the Office of Personnel Management to create new guidelines would not only result in unnecessary, duplicative efforts but would essentially transfer responsibility to an agency with less relevant expertise. Thus, for example, the bill fails to recognize that matters such as the "methodology and procedures to be used in the evaluation of any such samples" and "the respective minimum levels of reliability required for initial and confirmatory drug tests" have already been carefully and thoroughly developed. § 7352(c)(1)(B),(C). Furthermore, the bill's failure to define "initial" and "confirmatory" tests render the provisions concerning the actions which can and cannot be taken after either test very unclear.

Fourth, the bill provides that even the limited form of reasonable suspicion testing is permissible only if management negotiates the testing plan with federal employee unions and reaches an agreement with the unions. Since such matters generally have been held by the Federal Labor Relations Authority to be the non-negotiable exercise of management's right to determine its internal security practices, the bill would undermine fundamental principles of federal labor-management relations established by the Civil Service Reform Act of 1978.

Finally, the section of the bill that creates a new civil remedy against the United States for equitable and monetary relief is particularly troublesome. This provision would also serve to derogate the exclusive statutory scheme for resolving federal employment disputes in the Civil Service Reform Act as

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well as the comprehensive scheme for addressing tort claims against the United States in the Federal Tort Claims Act. Both of these Acts are reasonable channels for claims arising from the entire spectrum of governmental activities and have effectively withstood the test of time. The piecemeal approach which this provision of the bill would enact is arbitrary and undermines both the procedural and substantive provisions of these Acts. We are not only concerned about increased litigation against the United States but also about the adverse precedent this provision would create for future legislation regarding federal employment matters and tort claims against the United States.

The Office of Management and Budget has advised this Department that there is no objection to the presentation of this report from the standpoint of the Administration's programs.

Sincerely,

Thomas M. Boyd  
Assistant Attorney General

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101ST CONGRESS  
1ST SESSION

# H. R. 763

To amend title 5, United States Code, to establish certain restrictions relating to drug testing by Federal agencies, and for other purposes.

## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 2, 1989

Mr. ACKERMAN introduced the following bill; which was referred to the Committee on Post Office and Civil Service

## A BILL

To amend title 5, United States Code, to establish certain restrictions relating to drug testing by Federal agencies, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. RESTRICTIONS RELATING TO DRUG TESTING.

4 (a) IN GENERAL.—Chapter 73 of title 5, United States  
5 Code, is amended by adding at the end the following:

6 "SUBCHAPTER VI—RESTRICTIONS RELATING TO  
7 DRUG TESTING

8 "§ 7361. Definitions

9 "For the purpose of this subchapter—

10 "(1) the term 'agency' means—

1           “(A) an Executive agency;

2           “(B) a military department;

3           “(C) a court of the United States;

4           “(D) the Administrative Office of the United  
5 States Courts;

6           “(E) the Library of Congress;

7           “(F) the Botanic Garden; and

8           “(G) the Government Printing Office;

9           “(2) the term ‘employee’ means an individual em-  
10 ployed in or under an agency;

11           “(3) the term ‘controlled substance’ has the mean-  
12 ing given such term under section 102(6) of the Com-  
13 prehensive Drug Abuse Prevention and Control Act of  
14 1970;

15           “(4) the term ‘drug test’ means a test for detect-  
16 ing the presence of a controlled substance, or any resi-  
17 due or byproduct thereof, in the human body;

18           “(5) the term ‘action’ means a personnel action  
19 under clauses (i) through (x) of section 2302(a)(2)(A);  
20 and

21           “(6) the terms ‘labor organization’ and ‘collective  
22 bargaining agreement’ each has the meaning given  
23 such term under section 7103(a).

24 **“§ 7362. Restrictions**

25           “(a) An agency may not—

1           “(1) request, require, or threaten to require that  
2           an applicant for employment submit to a drug test; or

3           “(2) take, or fail to take, any action with respect  
4           to an applicant for employment, based on, or otherwise  
5           taking into consideration—

6           “(A) an offer to submit to a drug test; or

7           “(B) the results of any drug test.

8           “(b)(1) Except as otherwise provided in this subsection,  
9           an agency may not—

10           “(A) request, require, or threaten to require that  
11           an employee submit to a drug test; or

12           “(B) take, or fail to take, any action with respect  
13           to an employee, based on, or otherwise taking into  
14           consideration—

15           “(i) an offer to submit to a drug test; or

16           “(ii) the results of any drug test.

17           “(2)(A) An agency may request or require that an em-  
18           ployee submit to a drug test if at least 2 individuals having  
19           supervisory or oversight authority with respect to such em-  
20           ployee concur that—

21           “(i) the employee's performance is impaired; and

22           “(ii) there is reason to believe that the impairment  
23           is due, in whole or in part, to the employee's then  
24           being under the influence of a controlled substance.

1       “(B) In the case of an employee who is subject to the  
2       supervisory or oversight authority of only 1 individual, the  
3       findings required under paragraph (1) to be made by at least  
4       2 individuals may instead be made by the supervising or  
5       overseeing individual alone.

6       “(3) An employee having a positive result in a drug test  
7       permitted under paragraph (2) may be requested or required  
8       to submit to a confirmatory drug test, the design and method-  
9       ology of which shall be consistent with the purpose of deter-  
10      mining the validity of the earlier result.

11      “(4) Nothing in this subsection shall prevent an agency  
12      from taking an action against, or failing to take an action on  
13      behalf of, an employee on the basis of a positive result in a  
14      drug test requested or required of such employee under para-  
15      graph (2), if—

16             “(A) the results of the employee’s drug test under  
17             paragraph (3) are also positive; or

18             “(B) the employee fails or refuses to submit to the  
19             drug test requested or required under paragraph (3).

20      “(c)(1) The Office of Personnel Management shall estab-  
21      lish general guidelines for carrying out this section, including  
22      guidelines relating to—

23             “(A) the acquisition, handling, control, and dispos-  
24             al of any samples;

1           “(B) the methodology and procedures to be used  
2           in the evaluation of any such samples;

3           “(C) the respective minimum levels of reliability  
4           required for initial and confirmatory drug tests;

5           “(D) the personnel who may be authorized to con-  
6           duct drug tests and the qualification requirements for  
7           any such personnel;

8           “(E) procedures for maintaining the security and  
9           confidentiality of any medical or other records; and

10          “(F) procedures for providing information to, and  
11          otherwise assisting, employees needing drug-rehabilita-  
12          tion services.

13          “(2) The head of each agency shall prescribe regulations  
14          under which this section shall be carried out with respect to  
15          such agency. Regulations prescribed under this paragraph  
16          shall be in accordance with the general guidelines established  
17          under paragraph (1).

18          “§ 7363. Remedies

19          “(a) Subject to subsection (b), any person aggrieved by a  
20          violation of section 7362 may bring a civil action against the  
21          United States for equitable or monetary relief, or both, in the  
22          district court of the United States for the district in which  
23          that person resides, for the District of Columbia, or, in the  
24          case of an employee or former employee, for the district in

1 which that person was employed at the time the cause of  
2 action arose.

3       “(b) A civil action under this section shall be forever  
4 barred unless commenced within 2 calendar years after the  
5 date on which the cause of action arose.

6       “(c) The court may award to a prevailing plaintiff in an  
7 action brought under this section costs of litigation and rea-  
8 sonable attorney's fees.

9       “(d) The remedies provided by this section are in addi-  
10 tion to any other remedy available under law.

11 **“§ 7364. Collective bargaining**

12       “Notwithstanding any provision of section 7362, em-  
13 ployees within a unit with respect to which a labor organiza-  
14 tion is accorded exclusive recognition under chapter 71 shall  
15 not be subject to drug tests—

16               “(1) if, or to the extent that, the tests would vio-  
17 late a collective bargaining agreement between the  
18 agency and the labor organization; or

19               “(2) if drug tests are not covered by such a collec-  
20 tive bargaining agreement, unless or until there has  
21 been consultation or negotiation, as the case may be,  
22 in accordance with applicable provisions of law.

23 **“§ 7365. Exemptions**

24       This subchapter does not apply to—

1           “(1) the Central Intelligence Agency, in the case  
2           of any individual employed by, detailed to, or applying  
3           for a position in the Central Intelligence Agency; or

4           “(2) the National Security Agency, in the case of  
5           any individual employed by, detailed to, or applying for  
6           a position in the National Security Agency.”.

7           (b) CHAPTER ANALYSIS.—The analysis for chapter 73  
8           of title 5, United States Code, is amended by adding at the  
9           end the following:

          “SUBCHAPTER VI—RESTRICTIONS RELATING TO DRUG TESTING

          “Sec.

          “7361. Definitions.

          “7362. Restrictions.

          “7363. Remedies.

          “7364. Collective bargaining.

          “7365. Exemptions.”.

10       SEC. 2. EFFECTIVE DATE.

11           This Act shall take effect sixty days after the date of the  
12           enactment of this Act.

○